United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

B P/S

75-1157

To be argued by
JONATHAN J. SILBERMANN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

RAVELLE ROGERS,

Appellant.

Docket No. 75-1157

BRIEF FOR APPELLANT

ON APPEAL FROM AN ORDER AND JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

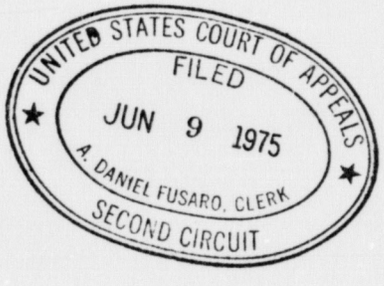

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TABLE OF CONTENTS

TABLE OF CASES

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QUESTION PRESENTED

Whether appellant was denied his Sixth Amendment right to confront and cross-examine witnesses.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from an order of the United States District Court for the Southern District of New York (The Honorable Constance Baker Motley) entered March 28, 1975, revoking, after a hearing, appellant's probation order and sentencing him to a term of imprisonment of five years.

This Court granted leave to appeal in forma pauperis, and The Legal Aid Society, Federal Defender Services Unit, was continued as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

On April 27, 1974, after a trial without a jury,* appellant was found guilty by The Honorable Constance Baker Motley of uttering and publishing as true a forged tax refund check with intent to defraud the United States, knowing that check to have been forged, in violation of 18 U.S.C. §495. On June 28, 1974, appellant was sentenced to a term of imprisonment of five years. Execution of sentence was

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*See Document #2 to the record on appeal, the waiver of a jury trial.

suspended and appellant was placed on probation for a period of five years.*

On February 28, 1975, the Probation Department filed a petition charging appellant with three specifications of violating the conditions of his probation.** The first specification charged that appellant was arrested for attempted burglary and harrassment on January 10, 1975; the second stated that appellant failed to work or seek employment; and the third charged him with failure to follow his probation officer's instructions and advice that he seek employment.

Appellant's probation revocation hearing commenced on March 20, 1975, and testimony was heard on three days.

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*See Document #3 to the record on appeal.

**See Document #7 to the record on appeal.

The Hearing

On March 20, 1975, the first day of the hearing, Police Officer Brown, a New York City policeman, testified that he had arrested appellant for harrassment and attempted burglary on the complaint of appellant's wife, Vivien Rogers (15*).

The hearing was adjourned, and continued on March 26. At that session appellant's wife, Vivien Rogers, testified that early in the morning of January 10, 1975, appellant, who had been separated from her for approximately sixteen months,** banged on the door of her apartment, called her curse words, and told her not to go to work, that he was going to kill her (35). Mrs. Rogers called the police (36), and appellant was arrested (10). As a result of these acts the New York State Family Court extended the existing order of protection.

James Wilson, appellant's probation officer, testified that appellant told him that appellant had been working as a credit manager for Arrow Graphics until a dispute arose with appellant's employer causing the termination of his

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*Numerals in parentheses refer to pages of the transcript of the probation revocation hearing.

**By order dated November 1, 1974, the New York State Family Court had granted an order of mutual protection requiring that each party refrain from acts constituting harrassment against the other.

employ (81). Further, Wilson testified that he referred appellant to Brenda Hudson, an employment counselor (53), and that Wilson periodically discussed with appellant the requirements of the order of probation (56). Wilson asked for verification of appellant's efforts to search for a job (56) and for a stamped employment card from the New York State Employment Service (57). During the period concerned, appellant provided Wilson with a letter from a prospective employer at Delight Records attesting to appellant's efforts to seek a position (57).

Fred Matthews, a community programs officer with the United States Bureau of Prisons, also testified on March 26. Matthews stated that he interviewed appellant on February 13, 1975. He also testified that there were jobs available in appellant's field (74) but at a salary lower than that appellant had requested (72-73, 79). He did not refer appellant to any job possibilities (77).

Appellant testified on his own behalf. His testimony contradicted that of his wife, for he denied he had kicked on her door or shouted curses at her (90), and he stated that he had been arrested outside her apartment building (91) where he was waiting for someone.* On the issue of employment, appellant testified that he had been to five

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*It is undisputed that appellant, accompanied by a police officer, had visited his wife earlier in the evening.

employment agencies as well as to Delight Records, Seiko Watch, Jefferson Metals, a funeral parlor and a laundry service in the Bronx (96, 98-99), and to a chapter of the NAACP (103).

After appellant's testimony, the District Court adjourned the hearing until the following day (167a), directing that the Government produce Alfred Cavalier, appellant's former employer, and Brenda Hudson (167), and requesting that Probation Officer Wilson determine whether recent employment applications had been made to the various agencies as appellant had testified (167).

On the adjourned date of the proceeding, appellant did not appear, and the District Court ordered the issuance of a bench warrant, sentencing appellant to a term of imprisonment of five years (169).

The Court then went on with the hearing. The Assistant United States Attorney, unsworn and not testifying as a witness, orally represented to the Court that she had communicated with Dennison Personal Agency, the NAACP, and A.P. Linen Service in the Bronx (171). Dennison reported no recent contact with appellant (171); an individual at the NAACP reported that appellant had been there (172). As was reported by the Assistant United States Attorney, persons at the A.P. Linen Service stated that appellant had worked there for two weeks in 1973 and then left (172).

Over objection (205), the Assistant United States Attorney also represented that she had called Delight Records and had spoken to Emma Rogers, who claimed not to be related to appellant (171). The Assistant United States Attorney then went on to say that the pre-sentence report reflected that appellant's mother's name was Emma Rogers and that she worked at that record company (171). The District Judge expressed her belief that the letter had been written by appellant's mother (210).

A report by appellant's probation officer was entered in appellant's absence as an exhibit of the Court.* This report stated that Wilson had contacted five agencies. One responded that appellant had submitted an application in the latter part of 1974 or early 1975, and two reported that they have no central filing system to verify applications for employment or appellant's assertions. The Seiko Watch Company, Jefferson Tank and Seat Manufacturing Company, and the St. Lawrence Funeral Chapel** in the Bronx reported that appellant had not contacted them for a job.

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*Court's Exhibit #3.

**Appellant could not name the specific funeral parlor he had contacted. Wilson contacted this particular funeral parlor because it was the only one in the area specified by appellant.

Cavalier, appellant's former employer, and Brenda Hudson, an employment interviewer with the New York State Employment Service, testified. Cavalier testified to appellant's employment record (178) and confirmed that a dispute with appellant had occurred (177).

Hudson stated that she interviewed appellant on October 16, 1974 (181), but that no referrals were made (182) since her referrals were limited to industrial work, and appellant expressed a desire to continue office work (182).

The District Judge found that appellant's conduct violated the conditions of his probation as charged, stating that she did not credit the testimony of appellant, finding him not worthy of belief (186).

The following day appellant appeared. Defense counsel reported that appellant had thought the hearing was adjourned for one week (189). Further, appellant's counsel made an application to re-open the hearing, based on the fact that formal evidence had been heard the preceding day which appellant had no opportunity to hear and could not rebut (189). Counsel requested the re-opening of the hearing in order to obtain the minutes of the testimony taken. The application to re-open was denied (190). However, the District Court did allow appellant an additional opp rtunity to testify (191).

The District Court vacated the bench warrant issued (189) and repeated her findings of appellant's violation of

probation (208-210), reiterating her earlier conclusion that appellant was unworthy of belief (210). Appellant was sentenced to a term of imprisonment of five years (213).

On June 9, 1975, the District Court filed a memorandum opinion and findings of fact.* The Court made specific findings of fact on each of the specified violations of probation charged in the petition filed by the United States Department of Probation.

Each of the findings of violation of probation was premised on the rejection of appellant's testimony and credibility. The finding of violation of State law was the result of the Court's acceptance of the testimony of appellant's wife and rejection of appellant's.**

The Court's finding that appellant failed to work or earnestly seek employment was similarly based on the rejection of appellant's testimony and the explicit acceptance of the testimony of Cavalier, Hudson, and Matthews.***

Finally, the finding that appellant failed to follow his probation officer's advice to seek employment was based on Wilson's testimony, the rejection of appellant's testimony of his efforts to obtain employment, and the Court's finding

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*The memorandum opinion and findings of fact are annexed as "C" to appellant's separate appendix.

**Memorandum Opinion at 3.

***Memorandum Opinion at 4-5.

that the one written verification of appellant's job interviews had been written by appellant's mother.*

The District Court additionally found that appellant had absented himself from the hearing wilfully and deliberately.**

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*Memorandum Opinion at 6.

**Memorandum Opinion at 7.

ARGUMENT

APPELLANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO CONFRONT AND CROSS-EXAMINE WITNESSES.

Two of the specifications in the probation violation warrant charged appellant with failing to work or to seek employment and to follow Probation Officer Wilson's advice to look for employment. In refutation of these specifications, appellant testified that he had been to five different employment agencies, five different firms, and a chapter of the NAACP in attempts to comply with the order of probation. The District Court sufficiently credited this testimony to require an adjournment of the hearing for further investigation of the claims that appellant had attempted to find work.

When the hearing resumed, over objection by defense counsel (174,190), a written report by appellant's probation officer and an oral report by the Assistant United States Attorney were offered and permitted into evidence. This evidence was not admitted through the testimony of a sworn witness, nor was it subject to cross-examination.

In Pointer v. Texas, 380 U.S. 400 (1965), the Supreme Court made clear that a critical part of the Sixth Amendment right of confrontation is the right to cross-examine

adverse witnesses, id., 380 U.S. at 403, 406,* a right made applicable to probation revodation hearings by Gagnon v. Scarpelli, 411 U.S. 778, 786 (1973).

Here, neither the prosecutor, who represented the Government in proceedings against appellant, nor the probation officer, who sought a decision terminating appellant's probation, was sworn as a witness subject to penalties of perjury and questioning by defense counsel as to the content or accuracy of their testimony. Without such cross-examination, counsel could not probe the basis for the reports which contradicted appellant's recitations of his efforts to obtain employment and his assertions that he had actually applied for jobs. This precluded counsel from determining what record-keeping procedures were used at the firms and agencies appellant said he had visited and from testing the accuracy of these reports.**

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*In Pointer, the prosecution entered into evidence at trial the transcript of testimony of a witness at a preliminary hearing. The problem, however, was that this witness was not subject to cross-examination at the preliminary hearing.

**The next day of the hearing appellant was in court. Judge Motley refused to order the minutes of the prior day's proceedings for counsel or to grant an adjournment, but gave counsel permission to call appellant to testify in rebuttal. This opportunity did not compensate for the inability to cross-examine. Appellant had nothing to add to what he had already said, but exploring the basis of the information provided by the Assistant United States Attorney and the Probation Officer could have revealed substantial problems in the information given to them in their investigations.

The opinion of the District Judge shows that the decision was based on her belief in the evidence which contradicted that given by appellant. It is clear from the transcript of the hearing that these reports were significant in causing the District Court to discredit appellant's testimony and to find him unworthy of belief (186, 210). This procedure violated appellant's Sixth Amendment right to cross-examine,* Pointer v. Texas, supra, 380 U.S. 403; cf. United States v. Mercado, 469 F.2d 1148, 1152 (2d Cir. 1972), and requires a new hearing.

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*The District Court found that appellant had voluntarily absented himself from the hearing on the day the unsworn testimony was admitted. However, that absence constituted at most a waiver of the right to face and see the accusing witnesses, not the right to have counsel cross-examine them. Diaz v. United States, 223 U.S. 442, 456-457 (1912); Illinois v. Allen, 397 U.S. 337, 346 (1970); United States v. Tortora, 464 F.2d 1202, 1208-1209 (1972).

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be reversed and a new hearing ordered.

Respectfully submitted,

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Certificate of Service

June 10, 1975

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Jonathan J. Silbermann